INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

CASES:

Fredrick et al. v. *United States*, 163 F. 2d 536, certiorari denied, 332 U.S. 775	9
Horning v. *District of Columbia*, 254 U.S. 135	6
Miller v. *United States*, 37 App. D. C. 138	9
Simmons v. *United States*, 142 U.S. 148	6
United States v. *Bushwick Mills*, 165 F. 2d 198	9

STATUTE:

Compiled Laws of Alaska, 1933 § 4778	2

MISCELLANEOUS:

F. R. Crim. P., Rule 30	9

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 611

Z. E. EAGLESTON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 449-467) is reported at 172 F. 2d 194.

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1949 (R. 468), and a petition for rehearing was denied February 4, 1949 (R. 469).

The petition for a writ of certiorari was filed February 28, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial judge, in his charge to the jury, assumed as true material facts in controversy and thus invaded the province of the jury.

2. Whether an instruction which disclosed the penalty for an included offense of which petitioner might have been convicted but not for the more serious offense of which he was convicted constituted reversible error.

STATUTE INVOLVED

Compiled laws of Alaska, 1933, § 4778:

> *Assault with a dangerous weapon.* Whoever, being armed with a dangerous weapon, shall assault another with such weapon, shall be punished by imprisonment in the penitentiary not more than ten years nor less than six months, or by imprisonment in the federal jail not more than one year nor less than one months, or by fine not less than one hundred dollars nor more than one thousand dollars.

STATEMENT

Petitioner was indicted in the District Court for the Territory of Alaska, Third Division, for assault with a dangerous weapon, in violation of Sec-

tion 4778, Compiled Laws of Alaska (R. 2-3). The evidence showed that in a quarrel with one Rowley over a business transaction, petitioner challenged him to a fight (R. 90, 96, 192, 249, 416). The challenge was apparently precipitated by Rowley's reference to petitioner as a "liar" (R. 90, 416). They sparred, blows were struck with the fists, and Rowley was knocked or pushed into a woodpile (R. 91, 176, 192, 255). There was evidence that petitioner struck Rowley twice on the head with a rake while the latter was attempting to rise from the ground (R. 177, 193, 249, 255), and fractured his skull (R. 250, 256, 296). Petitioner testified that he picked up the rake while Rowley was on the ground but merely held it defensively to discourage Rowley from continuing the fight (R. 417). He denied that he struck Rowley with the rake or any other implement (R. 418).

Petitioner was convicted as charged and he was sentenced to imprisonment for a term of three years (R. 37-38). Upon appeal to the Court of Appeals for the Ninth Circuit, the judgment of conviction was affirmed (R. 468).

So far as material to the issues presented in the petition for a writ of certiorari, the instructions to the jury included the following:

> 4. The essential elements which the government must prove to warrant conviction of the defendant of the crime charged in the indictment are:

First, that the crime, if any, was committed at Anchorage, Alaska, on the 30th day of July, 1946, or at any time within three years prior to October 1, 1946;

Second, that at said time and place the said defendant, Z. E. Eagleston, being then and there armed with a dangerous weapon, to wit, a long-handled garden rake, did then and there wilfully, feloniously and unlawfully, make an assault upon another person whose name is Frank Rowley, with said dangerous weapon, by then and there striking, beating and wounding the head of the said Frank Rowley with the said dangerous weapon.

If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon. The law provides that the defendant may be found guilty of an offense necessarily included in the offense charged in the indictment. The offense or crime which is known as "assault" is necessarily included in the crime of assault with a dangerous weapon charged in this indictment. The provision of our laws with respect to the crime of assault reads as follows:

"Whoever, not being armed with a dangerous weapon, unlawfully assaults or

threatens another in a menacing manner, or unlawfully strikes or wounds another, shall be fined not more than $500.00 or imprisoned in the federal jail not more than six months, or both." [R. 8-9.]

* * *

4-D. Even if you should believe that Rowley called the defendant a liar, in words or substance, on the day of and before the alleged commission of the crime charged in the indictment, the use of such words by Rowley and his application of them to the defendant would not justify an assault by the defendant upon Rowley, whether the defendant was or was not then armed with a dangerous weapon.

It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States. [R. 11.]

Petitioner objected at the trial to Instruction 4-D on the ground that it assumed on its face that he was the aggressor. He did not object to Instruction 4. (R. 23.)

ARGUMENT

1. Petitioner does not deny that Instruction 4-D embodies a correct statement of law. His contention (Pet. 12) is only that the trial court invaded

the province of the jury by assuming as true material facts which were in dispute.

We submit that Instruction 4-D cannot fairly be construed as containing any assumption of material fact, as petitioner urges (Pet. 24-25). The trial judge advised the jury of the law which they were required to apply to such facts as they might find. In its context, the reference to the altercation between Rowley and petitioner served merely as an hypothesis upon which to illustrate the application of the law of self-defense. But even as a statement of the judge's opinion of the evidence, the instruction was not improper, for it is well established that federal trial judges may comment on questions of fact which are submitted to the jury for determination. *Horning* v. *District of Columbia,* 254 U. S. 135; *Simmons* v. *United States,* 142 U. S. 148, 155.

Taking the charge in its entirety, as we must, the jury was clearly admonished that no verdict of guilty should be returned unless every essential element of the crime charged, which specifically included the assault, was proved to their satisfaction beyond a reasonable doubt (R. 7-8, 13). And the trial judge further instructed the jury (R. 19):

> You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

> As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.
>
> During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

Petitioner's argument that the trial court in effect stated to the jury that petitioner committed an assault upon Rowley and attempted to hit and injure him with his fists is specious (Pet. 24, 28). The instruction in question, as we have shown, does not assume that petitioner was the aggressor, and, moreover, petitioner admitted that he engaged in combat with Rowley and that each of them attempted to strike and did strike the other (R. 417). The issue whether petitioner was the aggressor in initiating the fight is unimportant so far as the crime of which he stands convicted is concerned. Petitioner's conviction of assault with a dangerous weapon was based implicitly upon a finding by the jury that the altercation had passed beyond the stage of fisticuffs, and that petitioner had used a deadly weapon, a long-handled rake, to inflict a serious wound upon Rowley while the latter was lying on the ground. As the Court of Appeals said (R. 460-461):

The record reveals that the whole sweep of the evidence and the theory of the prosecution (which was met at trial by the defense tendered in appellant's testimony) was confined to the issue of whether appellant was guilty of the offense of being armed with a rake and beating Rowley on the head with it.

We are fully persuaded that on the facts shown in the evidence this case was lifted out of the ambit of a mere sparring match in which one of the actors was knocked or pushed to the ground. This controlling and fundamental issue was recognized by the court and correctly submitted to the jury, and that issue was whether the act of appellant in later grabbing a rake and beating Rowley on the head with it while Rowley was on the ground abruptly transformed a preliminary fistic encounter into an assault with a dangerous weapon. If the rake when so wielded by appellant could, and actually did produce the extensive skull fracture suffered by Rowley, and appellant intended to assault Rowley with it at the time, it requires no argument to establish that such use of the rake was an assault with "a dangerous weapon."

On this particular point the court instructed the jury that it could not find appellant guilty of the charge in the indictment unless it was convinced beyond a reasonable doubt that appellant was not only armed with a dangerous weapon but *intended* to assault Rowley with this weapon.

2. Petitioner also contends (Pet. 30-31) that Instruction 4, *supra,* was erroneous because the trial court, in quoting the statute defining simple assault, disclosed the punishment for that offense, but did not inform the jury of the punishment for assault with a dangerous weapon, and that the error tended to "mislead and influence the jury". No objection to this instruction was made at the trial, as required by Rule 30, F. R. Crim. P.,[1] and his present contention comes too late. *Fredrick* v. *United States,* 163 F. 2d 536, 549 (C. A. 9), certiorari denied, 332 U.S. 775; *United States* v. *Bushwick Mills,* 165 F. 2d 198, 201 (C.A. 2).

It would have been better practice, of course, to omit all reference to punishment. But we fail to see how petitioner was in any way prejudiced. In *Miller* v. *United States,* 37 App. D.C. 138, with which the decision below is said to be in conflict (Pet. 13, 32-33), the situation was obviously different. The trial judge in the *Miller* case instructed the jury in effect that if the defendant were found guilty he might reopen the case and hear testimony upon the question of motive and might conclude that no prison sentence, but only a fine, should be imposed. The jury acquitted Miller

[1] This rule provides in pertinent part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

on 28 counts and convicted him on two, which charged embezzlement of about $1,740. He was sentenced to 20 years in the pentitentiary. The conviction was reversed because the Court of Appeals considered it clearly possible under the peculiar circumstances that some members of the jury may have been influenced to vote for conviction on the two counts because of an expectancy, engendered by the trial court's statement, that a prison sentence would not be imposed. In the present case it is not apparent how the court's inadvertent reference to the punishment for simple assault could have influenced the verdict. To the contrary, petitioner's contention (Pet. 31) that the jury were invited by the instruction to convict "in the belief that a penalty not greater than that disclosed would be meted out by the Court" is clearly without merit, since the jury rendered a verdict of guilty, not of the offense the punishment for which was disclosed, but of the more serious offense of assault with a dangerous weapon.

CONCLUSION

The decision below is correct and no conflict of decision is involved. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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